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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 65

UNITED STATES OF AMERICA, APPELLANT

v.

HERBERT GUEST, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ATHENS DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 19–39) is unreported.

JURISDICTION

The judgment of the district court was entered on January 8, 1965 (R. 40). Notice of appeal was filed on January 27, 1965. On June 1, 1965, this Court entered an order postponing decision of the question of jurisdiction to the hearing on the merits (R. 45). The jurisdiction of this Court is invoked under 18 U.S.C. 3731.[1]

[1] Insofar as there is a jurisdictional question with respect to one part of the case, it is discussed at pp. 62–66, *infra*.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution:

ARTICLE I.

SECTION 8. The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

* * * * *

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Federal Statutes:

18 U.S.C. 241

If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

They shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

Civil Rights Act of 1964

(42 U.S.C. 2000a, *et seq.*)

Sec. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

* * * * *

Sec. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Sec. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive, or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for

exercising or attempting to exercise any right or privilege secured by section 201 or 202.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

* * * * *

SEC. 207. (b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

QUESTIONS PRESENTED

1. Whether Section 241 of the Criminal Code reaches private conspiracies against the exercise of rights secured by the Equal Protection Clause of the Fourteenth Amendment.

2. Whether Section 241 reaches conspiracies against the exercise of the rights to travel freely to and from any State and to use the instrumentalities of interstate commerce.

3. Whether Section 241 reaches conspiracies against the exercise of rights secured by Title II of the Civil Rights Act of 1964.

STATEMENT

On October 16, 1964, the United States Grand Jury for the Middle District of Georgia returned an indictment (R. 1–2) charging six individuals with engaging in a criminal conspiracy in violation of 18 U.S.C. 241. None of the defendants was alleged to hold public office or to be acting "under color of law." The objects of the conspiracy were alleged to be—

> * * * to injure, oppress, threaten and intimidate Negro citizens of the United States in the vicinity of Athens, Georgia, in the free exercise and enjoyment by said Negro citizens of the following rights and privileges secured to them by the Constitution and laws of the United States:
>
> 1. The right to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of motion picture theaters, restaurants, and other places of public accommodation;

2. The right to the equal utilization, without discrimination upon the basis of race, of public facilities in the vicinity of Athens, Georgia, owned, operated or managed by or on behalf of the State of Georgia or any subdivision thereof;

3. The right to the full and equal use on the same terms as white citizens of the public streets and highways in the vicinity of Athens, Georgia;

4. The right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia;

5. Other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia.

The indictment particularized the means by which the conspirators planned to achieve their goal, which included beatings, shootings, killings, and other acts of violence against the persons and property of Negroes.

The defendants moved to dismiss the indictment on the ground that it did not charge an offense under the laws of the United States (R. 13, 18). The district court sustained the motion and dismissed the indictment as to all defendants (R. 40).

Following the court of appeals decision in *Williams* v. *United States*, 179 F. 2d 644 (C.A. 5), affirmed partly on other grounds, 341 U.S. 70, the district court held that 18 U.S.C. 241 does not punish an invasion of rights secured by the Fourteenth Amendment—the only rights alleged by the indictment, in the court's view (R. 19–32). That ruling made it unnecessary to

consider separately the further question whether wholly private conspiracies directed at Fourteenth Amendment rights are within the constitutional reach of Section 241. Focusing on paragraph 4 of the indictment--which alleges interference with interstate travel and the use of interstate facilities--the district court concluded that no right of national citizenship was there stated (R. 33). And it likewise rejected the contention that Titles II (public accommodations) and III (public facilities) of the Civil Rights Act of 1964 created federal rights that might be vindicated by a criminal prosecution under 18 U.S.C. 241 (R. 34-35).[2]

SUMMARY OF ARGUMENT

The indictment (in one count) charges the same group of individuals (none of whom are alleged to be holding public office or to be acting under color of law) with engaging in a single conspiracy generally directed at preventing Negroes from exercising or enjoying their civil rights, in violation of Section 241 of the Criminal Code. But those rights, in turn, fall into three separate categories, each derived from a different source and involving distinct legal questions. Accordingly, we treat separately the reach of Section 241 with respect to private conspiracies interfering with (1) rights grounded in the Equal Protection

[2] The district court also ruled that paragraph 5 of the indictment (alluding to "other rights exercised and enjoyed by white citizens in the vicinity of Athens, Georgia") was so vague and indefinite as to contribute "nothing toward the validity of the indictment" (R. 34). We acquiesced in that ruling below and do not challenge it here.

Clause of the Fourteenth Amendment—specifically, the right to the "equal utilization, without discrimination upon the basis of race, of public facilities * * * owned, operated or managed" by the State, including the "public streets and highways," mentioned in the second and third numbered paragraphs of the indictment; (2) the right to travel freely to and from any State and the right to use the instrumentalities of interstate commerce—recited in the fourth numbered paragraph of the indictment; and (3) the right to the equal advantages of restaurants, motion picture theaters and other privately owned places of public accommodation, guaranteed by Title II of the Civil Rights Act of 1964 (alleged in the first numbered paragraph of the indictment).

I

The right to the non-discriminatory use of public facilities owned or operated by the State itself is one grounded in the Equal Protection Clause of the Fourteenth Amendment. In light of *United States* v. *Williams,* 341 U.S. 70, the threshold question with respect to this branch of the case is whether Section 241 protects Fourteenth Amendment rights at all. For an affirmative answer on that issue, we rely upon our brief in *United States* v. *Price,* Nos. 59 and 60, this Term. We then turn to the text and legislative history of Section 241 to show that it was meant to reach private individuals acting in conspiracy, and, applying the strict requirements of *Screws* v. *United States,* 325 U.S. 91, we conclude that, so construed, the statute is not impermissibly vague.

The more basic question is whether there is congressional power to reach private action interfering with the enjoyment of a right guaranteed by the Equal Protection Clause. Confining our argument to activities in which the State is directly involved—here, the operation of its own facilities—we find authorization for such legislation in Section 5 of the Fourteenth Amendment, empowering Congress to "enforce" the guarantees of Section 1 "by appropriate legislation." There is, we show, no obstacle in the text of the Equal Protection Clause, which, while it may command equality only in a limited area, does not foreclose any means which Congress may reasonably think necessary to achieving that end. That conclusion, we suggest, is compelled by the indications of the purpose of the framers of the Amendment—the evidence of private oppression submitted to the drafters and the subsequent legislation enacted by congressmen, many of whom had participated in framing the Amendment. We also find support for this construction in the first judicial decisions under the Amendment, by judges immediately familiar with its history. Finally, while acknowledging that there are statements in subsequent opinions of the Court which point the other way, we show that no decision here forecloses our submission.

II

The right to pass freely from State to State and the right to use the instrumentalities of interstate commerce

are, we submit, "rights which arise from the relationship of the individual to the Federal Government," and, as such, are protected as against private interference by Section 241—even accepting the narrowest construction of that statute. The first of those rights is not expressly granted by the Constitution, but inheres in the structure of the federal Union, as decisions of this Court have repeatedly recognized. The bare right to unhampered use of the instrumentalities of interstate commerce is, we suggest, conferred by the Commerce Clause itself, even without implementing legislation.

III

On its face, the right to non-discriminatory service by privately owned places of public accommodation—now guaranteed by Title II of the Civil Rights Act of 1964, enacted under the commerce power—seems plainly a right protected by Section 241 against conspiracies. The only question is whether the exclusive-remedy provision of the 1964 Act confines enforcement of the new right to proceedings for injunctive relief and bars a criminal prosecution in all circumstances. We think not. The benevolent policy of the Act with respect to businessmen under economic pressure has no application to a case like this one, involving terrorists, unconnected with any establishment, who act from malice and against whom a "civil action for preventive relief" is plainly inadequate.

ARGUMENT

I

SECTION 241 REACHES UNOFFICIAL CONSPIRACIES AGAINST THE EXERCISE OF RIGHTS SECURED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The indictment alleges a conspiracy by private persons—not claimed to be holding public office or acting under color of State law—forcibly to prevent Negroes, because of their race, from enjoying, equally with whites, among other rights, the benefits of public facilities owned or operated by the State, including the local public streets and highways. That is, of course, a right protected by the Fourteenth Amendment's command of equality—whether it relates to schools,[3] parks and playgrounds,[4] golf courses,[5] beaches,[6] municipal auditoriums,[7] courthouses [8] and other public buildings,[9] or the city streets.[10] Indeed, it has its only source in the

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[3] *Brown* v. *Board of Education*, 347 U.S. 483; *Cooper* v. *Aaron*, 358 U.S. 1; *Orleans Parish School Board* v. *Bush*, 365 U.S. 569, 366 U.S. 212, 367 U.S. 907, 908, 368 U.S. 11; *St. Helena Parish School Board* v. *Hall*, 368 U.S. 515; *Goss* v. *Board of Education*, 373 U.S. 683; *Griffin* v. *School Board*, 377 U.S. 218.

[4] *New Orleans Park Ass'n.* v. *Detiege*, 358 U.S. 54; *Wright* v. *Georgia*, 373 U.S. 284; *Watson* v. *Memphis*, 373 U.S. 526; *City of New Orleans* v. *Barthe*, 376 U.S. 54.

[5] *Holmes* v. *City of Atlanta*, 350 U.S. 879; *New Orleans Park Ass'n.* v. *Detiege*, *supra*.

[6] *Mayor and Council of Baltimore* v. *Dawson*, 350 U.S. 877;

[7] *Muir* v. *Louisville Park Theatrical Ass'n.*, 347 U.S. 971.

[8] *Johnson* v. *Virginia*, 373 U.S. 61.

[9] *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Turner* v. *City of Memphis*, 369 U.S. 350.

[10] Cf. *Gayle* v. *Browder*, 352 U.S. 903.

Equal Protection Clause.[11] Accordingly the validity of the indictment in this respect depends upon whether Section 241 of the Criminal Code reaches unofficial conspiracies directed at blocking specific rights secured by the Fourteenth Amendment.

The major question is one of the constitutional power of Congress: Does the Fourteenth Amendment authorize punitive legislation bearing directly against individuals to "enforce" the rights secured by the Equal Protection Clause? Before we reach that inquiry, however, there are preliminary questions of statutory construction to which we first turn.

A. THE QUESTIONS OF STATUTORY CONSTRUCTION

1. *Section 241 was intended to protect Fourteenth Amendment rights*

At the threshold is the contention—upheld below—that Section 241 does not encompass Fourteenth Amendment rights at all. That question was left unresolved by an evenly divided Court in *United States* v. *Williams*, 341 U.S. 70, and is now before the Court in *United States* v. *Price*, Nos. 59 and 60, this Term. For the reasons stated by Mr. Justice Douglas for four members of this Court in *Williams*

[11] That is not to say that the right in question is not implemented by statutes other than 18 U.S.C. 241. On the contrary, it is clearly encompassed by the general civil rights statutes providing for civil relief, now Sections 1983 and 1985 of Title 42 of the United States Code, and is more particularly recognized in Title III of the Civil Rights Act of 1964. But those enactments, insofar as here relevant, merely enforce the guarantee of the Equal Protection Clause of the Fourteenth Amendment.

(see 341 U.S. at 90–93) and discussed in our brief in *Price* (see pp. 12–28), we believe rights secured by the Fourteenth and Fifteenth Amendments are within the scope of Section 241. To be sure, *Williams* and *Price* both involve *due process* rights, whereas the present indictment charges interference with rights secured by the *Equal Protection Clause* of the Fourteenth Amendment. But no one has suggested a basis, and none appears, for concluding that Section 241—if it encompasses Fourteenth Amendment rights at all—protects rights secured by the one clause but not those guaranteed by the other. Our argument in *Price* is fully applicable here and need not be repeated.[12] The further question in the present case is whether the provision reaches private action designed to defeat the implementation of those rights.

2. *Section 241 was intended to protect Fourteenth Amendment rights against private conspiracies*

Once it is settled that a right declared by the Fourteenth Amendment is a "right or privilege secured * * * by the Constitution" within the meaning of Section 241, there is, in truth, no remaining question of statutory construction. The language of the

[12] It does not necessarily follow, however, that Section 241 reaches *unofficial* conspiracies directed against the exercise or enjoyment of due process rights; the present brief is confined to the proposition that the section may constitutionally reach private group action directly interfering with the exercise of certain specific rights guaranteed by the Equal Protection Clause. Because, as we show below, the same rationale applies, we conclude that Section 241 also encompasses private interference with the right secured by the Fifteenth Amendment.

provision is plainly broad enough to cover wholly "private" [13] conspiracies: the crime may be committed by any "two or more persons," whether or not holding public office or acting "under color of law." *Ex parte Yarbrough*, 110 U.S. 651; *United States* v. *Waddell*, 112 U.S. 76; *Logan* v. *United States*, 144 U.S. 263; *In re Quarles*, 158 U.S. 532; *Motes* v. *United States*, 178 U.S. 458; see *United States* v. *Classic*, 313 U.S. 299, 315.

Nor is there any doubt that those who enacted Section 241 meant to reach so far. Senator Pool of North Carolina, in sponsoring the amendment that was to become Section 6 of the Enforcement Act of 1870—and, ultimately, Section 241 of the Criminal Code [14]—reiterated his preoccupation with private conspiracies. Indeed, in his view, one of the principal virtues of his proposal was that it reached individuals acting in conspiracy who held no official powers. As he said (Cong. Globe, 41st Cong., 2d Sess., p. 3611):

> * * * individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are con-

[13] We use the term "private conspiracies" in the brief as a convenient shorthand to describe the conspirators as private individuals who neither hold public office nor act under color of law. We do not mean to so characterize the purpose or object of the conspiracy, which is, of course, far from "private", affecting, as it does, the right to enjoy public facilities owned or operated by the State itself.

[14] We have traced the history of Section 241 in the companion case of *United States* v. *Price*, Nos. 59 and 60, this Term. See Brief for the United States, pp. 15–28.

> ferred upon the citizen by the fourteenth amendment, as well as trespass upon the right conferred by the fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose.

And, again, asserting the propriety of the legislation, Senator Pool said (*id.*, p. 3613):

> * * * That the United States Government has the right to go into the States and enforce the fourteenth and the fifteenth amendments is, in my judgment, perfectly clear, by appropriate legislation that shall bear upon individuals. I cannot see that it would be possible for appropriate legislation to be resorted to except as applicable to individuals who violate or attempt to violate these provisions. Certainly we cannot legislate here against States. As I said a few moments ago, it is upon individuals that we must press our legislation. It matters not whether those individuals be officers or whether they are acting upon their own responsibility; whether they are acting singly or in organizations. If there is to be appropriate legislation at all, it must be that which applies to individuals.

The fact is that Section 241 had its "source * * * in the doings of the Ku Klux and the like," as Mr. Justice Holmes noted for the Court in *United States v. Mosley*, 238 U.S. 383, 387. It was intended to reach all their works, including interference with the rights recently declared by the Fourteenth Amendment. Here "Congress put forth all its powers." *Ibid.* The only question is whether the statute, so con-

strued, overreaches the constitutional power of Congress because the Fourteenth Amendment is in terms addressed to the States alone.

3. So construed, Section 241 is not impermissibly vague

Before turning to the ultimate question of congressional power, we pause to consider the objection that construing Section 241 to reach private conspiracies directed against Fourteenth Amendment rights would render it too vague and indefinite for a criminal statute. That question, it seems to us, is fully answered by *Screws* v. *United States,* 325 U.S. 91, and the opinion of Mr. Justice Douglas for four members of the Court in *United States* v. *Williams,* 341 U.S. 70, 93–95.

The decision in *Screws* announces two requirements for a criminal provision generally enforcing the Due Process or Equal Protection guarantees of the Fourteenth Amendment: (1) That it operate only against an offender acting with specific intent to infringe the right in question, and (2) that the right protected have been "made definite by decision or other rule of law." Both conditions are satisfied here. As Mr. Justice Douglas pointed out in *Williams, supra,* Section 241 meets the first requirement by virtue of being a conspiracy statute: the provision does not punish merely causing or permitting an injurious result, by negligence or otherwise, but only the purposeful agreement to inflict the injury. Vagueness is not imparted because the statute reaches private conspiracies, else it could never serve its most traditional function. See,

e.g., Ex parte Yarbrough, 110 U.S. 651; *United States* v. *Waddell,* 112 U.S. 76; *Logan* v. *United States,* 144 U.S. 263; *In re Quarles,* 158 U.S. 532; *Motes* v. *United States,* 178 U.S. 458. Whether it operates against conspiracies directed against a Fourteenth Amendment right or conspiracies to obstruct the enjoyment of another "right or privilege secured * * * by the Constitution or laws of the United States," Section 241 reaches only direct, purposeful interference with its exercise or enjoyment. The true scope of the statute is illustrated by the present indictment which alleges a deliberate conspiracy of violence and terror explicitly designed to prevent or deter Negroes, on account of their race alone, from enjoying the benefit of public facilities owned or operated by the State. Properly confined by appropriate instructions guarding against conviction for equivocal conduct remotely related to the right involved, there is no vagueness in that charge.

To be sure, Section 241 is not, on its face, expressly restricted to constitutional rights which have been "made definite by decision or other rule of law." But neither is Section 242 so construed in *Screws* v. *United States, supra,* and *Williams* v. *United States,* 341 U.S. 97. As Mr. Justice Douglas noted in *United States* v. *Williams,* 341 U.S. 70, 94–95, the same considerations dictate a similar reading of both statutes. Certainly the present indictment describes specific and indisputable rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment. We have already noted the decisions in this

Court which definitively establish the right to nondiscriminatory enjoyment of public facilities owned or operated by the State. See notes 3–10, *supra* p. 11. The matter is "no longer open". *Johnson* v. *Virginia*, 373 U.S. 61, 62. Indeed, the right is now expressly recognized by federal legislation authorizing the Attorney General to institute legal proceedings to open State facilities to nondiscriminatory use. Civil Rights Act of 1964, § 301, 42 U.S.C. 2000b.

We conclude that Section 241 must be read as protecting specific rights secured by the Equal Protection Clause of the Fourteenth Amendment against private conspiracies unless that construction overreaches the constitutional power of Congress. We now turn to that question.

B. THE QUESTION OF CONSTITUTIONAL POWER

Our submission is that Congress is empowered to implement the right of Negroes to enjoy, equally with others, the benefits of State-owned or State-operated public facilities by punishing those who interpose themselves to prevent it, although the offenders be private individuals who neither hold public office nor act under color of law. That seems to us wholly "appropriate legislation" authorized by the Fifth Section of the Fourteenth Amendment to "enforce" a right guaranteed by the Equal Protection Clause of the Amendment's First Section. Indeed, in the circumstances outlined by the indictment—a conspiracy of violence directed against Negroes on account of

their race, designed to terrorize them out of asserting their undoubted right to use the public facilities furnished by the State—it offers the only practical remedy; by hypothesis, the State itself is not actively engaged in discrimination which calls for injunctive relief and (assuming federal power exists) it is not normally possible to compel the State to halt the interference, even if it has the means.

Given the prevalence of these conditions at the time of the framing of the Fourteenth Amendment and the obvious advantages of this solution over the more destructive alternatives—federal military intervention or congressional dictation of adequate State laws and supervision of their enforcement—it would be surprising if those who wrote the Amendment had not meant to empower Congress to reach private conspiracies dedicated to defeating the realization of the new equality that was now held out to the Negro. This is not to deny that there are statements in decisions of this Court which apparently point the other way. See *United States* v. *Harris,* 106 U.S. 629, 638–640; *Civil Rights Cases,* 109 U.S. 3, 11–19. See, also, *United States* v. *Cruikshank,* 92 U.S. 542, 554; *Virginia* v. *Rives,* 100 U.S. 313, 318; *James* v. *Bowman,* 190 U.S. 127, 139 (Fifteenth Amendment). However, as we point out below (pp. 46–52), they are not controlling here.

Our position, we stress, involves no radical reinterpretation of the Fourteenth Amendment. The doctrine of "State action" is a bar only if it is understood as invariably restricting the operation of the

Equal Protection Clause—and the power of Congress to enforce it—to situations in which the State, through its agents, is guilty of active discrimination, and as confining all remedies—whether fashioned by courts or embodied in legislation—to those that expend themselves directly on the State or its agents. That narrow rule, we suggest, does not accurately measure the scope of the congressional power to enforce the Fourteenth Amendment in circumstances like those alleged here; nor do we think it compelled by any decision in this Court.

Moreover, our argument does not touch the bundle of rights embraced in the Due Process Clause. There, the "State action" concept may be wholly appropriate to confine legislation within constitutional limits and the effort to control individual conspiracies might involve a risk of supervening (or duplicating) a large part of the municipal law of the States. See *United States* v. *Cruikshank, supra,* 92 U.S. at 553–554; *Civil Rights Cases, supra,* 109 U.S. at 13, 14–15. But there is no such problem here. Section 241, as we construe it, does not punish every crime against the local peace; nor would a comparable civil provision reach every tort. Even anti-racial assaults, prompted by discriminatory motives, are outside our argument unless they involve a specific intent to create or perpetuate an inequality in the relations between the individual and the State.

Nor does our approach challenge familiar boundaries to bring the command of equality to new territory. We make no claim based on some tenuous

theory of State involvement. Much less do we argue that discrimination in certain private activities is constitutionally reachable because the State has constitutional power to end it and has defaulted. Our case is not in a borderline zone where inequalities may be viewed as matters which the Constitution leaves to State regulation or to private choice. We are, indeed, at the core of the area governed by the Equal Protection Clause: the State's own facilities are involved and it is the right to enjoy them equally that is sought to be enforced.

Finally, our argument does not suggest the intrusion of federal sanctions against individual acts when the State is clearly able and willing to deal with them. To be sure, federal jurisdiction, if otherwise proper, is not usually ousted because the State offers its own remedy. *McNeese* v. *Board of Education*, 373 U.S. 668; *Monroe* v. *Pape*, 365 U.S. 167. Yet, the necessity for national solutions is always relevant to the appropriateness of congressional intervention in the zone of concurrent State jurisdiction. As we construe it, Section 241 governs individual conduct only when the State (whether or not at fault) has defaulted, or at least, is in danger of defaulting, in effecting equality in an area where the Constitution commands it. That is not to say that application of the federal sanction depends, in each case, upon the existence and sufficiency of local remedies in the particular community. Section 241 imposes no such impractical condition. But the statute is, nevertheless, premised on a congressional finding—reasonable then

as now—that the States could not, or would not, effectively remove a practical barrier to the enjoyment of constitutional rights.

It is proper to emphasize that the federal statute does not deal with the isolated act of a single individual, but a conspiracy, typically violent, more dangerous and more likely to succeed. As a practical matter, at least in the area of public facilities, such conspiracies are formed to *perpetuate* a State default and survive only when the State itself cannot or will not suppress them. That is, of course, especially true of racial discrimination, as to which no one can gainsay the need for national action, in 1870 or today. Indeed, insofar as it operates against individuals interfering with rights secured by the Equal Protection Clause, it may be appropriate to confine Section 241 to cases of invidious discrimination against an identifiable class (see *Snowden* v. *Hughes*, 321 U.S. 1), or even to discrimination against the Negro, the special beneficiary of the Fourteenth Amendment. See *Slaughter-House Cases*, 16 Wall. 36, 81; *Strauder* v. *West Virginia*, 100 U.S. 303, 306–307.

Such is the burden of our argument. We now turn to the several considerations which sustain the conclusion that Congress was empowered by the Fifth Section of the Fourteenth Amendment to enforce the Equal Protection Clause as we think it did in Section 241.

1. *The text of the Equal Protection Clause, read in conjunction with the Fifth Section of the Fourteenth Amendment, authorizes legislation reaching private conspiracies*

Even without a special delegation of authority, Congress has inherent power to implement, by positive legislation, a right granted or secured by the Constitution. See *Strauder* v. *West Virginia,* 100 U.S. 303, 310–311. That was settled in the decisions upholding the Fugitive Slave Acts of 1793 and 1850 (*Prigg* v. *Pennsylvania,* 16 Pet. 539; *Ableman* v. *Booth,* 21 How. 506), and it is the necessary assumption of the cases sustaining federal legislation protecting the right to vote in Presidential elections—which the Constitution does not expressly empower Congress to regulate. *Burroughs and Cannon* v. *United States,* 290 U.S. 534. See, also, *Ex parte Yarbrough,* 110 U.S. 651, 658. But the matter was not left in doubt with respect to the Fourteenth Amendment. Section 5 expressly empowers Congress "to enforce" the guarantees "by appropriate legislation," including, of course, the right to "equal protection of the laws."

What is the scope of the power given? In the landmark case of *Ex parte Virginia,* 100 U.S. 339, 345-346, this Court generally defined the breadth of enforcement sections of the three post-War Amendments:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and

> to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

With specific reference to enforcement of the guarantee of the Equal Protection Clause, it has been said that Congress may adopt any "appropriate mode of * * * securing * * * the enjoyment of the right," and that "[t]he form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide." *Strauder* v. *West Virginia, supra,* 100 U.S. at 310–311. In short, the power to enforce here would seem to be fully as broad as under the "necessary and proper" clause of the original Constitution (see *McCulloch* v. *Maryland,* 4 Wheat. 316, 420; *Atlanta Motel* v. *United States,* 379 U.S. 241, 255) or the enforcement clause of the other amendments. See, *e.g., Everard's Breweries* v. *Day,* 265 U.S. 545, 558–559.

In sum, the power of Congress is not narrowly confined. Here, as elsewhere, congressional enforcement goes beyond the self-operative scope of the Constitution. The Equal Protection Clause "derive[s] much of [its] force" from the provision authorizing Congress to enforce it. *Ex parte Virginia, supra,* 100 U.S. at 345, 347–348. Just as statutes implementing the Commerce Clause may reach *intrastate* activities that affect interstate commerce (*e.g., Atlanta Motel* v. *United States, supra*), and legislation carrying into effect the Eighteenth

Amendment's prohibition on the sale of intoxicating liquors for *beverage* purposes could regulate the dispensation of alcohol for *medicinal* uses (*Everard's Breweries* v. *Day, supra*), so, here, it would seem that Congress has power to outlaw all direct interference with the enjoyment of equal protection of State laws, from whatever source it might come—even though the Equal Protection Clause itself, *ex proprio vigore,* may inhibit State action alone. Unless the right itself is very narrowly circumscribed, it is difficult to appreciate why Congress cannot protect it against private conspiracies—in the same way that the right to vote in congressional elections or the right to establish a homestead on federal land is protected. See, *Ex parte Yarbrough,* 110 U.S. 651; *United States* v. *Waddell,* 112 U.S. 76.

The words of the Equal Protection Clause are: "No State shall * * * deny to any person within its jurisdiction the equal protection of the laws." We now examine that text as it bears on the power of Congress to legislate under Section 5 of the Amendment, asking, in turn, (a) *what* is the nature of the right secured; (b) *where* does the guarantee operate; (c) *when* does the enforcement power come into play; and finally, (d) *how* may it be exercised and against *whom.*

a. It is axiomatic that Congress can only "enforce" the right secured; hence, we must look to the Equal Protection Clause itself to see what is guaranteed. Though framed as an injunction, it is clear that the provision confers "positive rights" on individuals (*Civil Rights Cases,* 109 U.S. 3, 11), for "every pro-

hibition implies the existence of rights and immunities." *Strauder* v. *West Virginia,* 100 U.S. 303, 310. Nor do the words imply an exemption or immunity only. "No State shall deny" plainly means "every State shall grant," and, of course, "the beneficiaries shall enjoy." See *Neal* v. *Delaware,* 103 U.S. 370, 386. The correct analysis of the Equal Protection Clause, it seems to us, is that given of the similarly worded Fifteenth Amendment by Mr. Justice Bradley, sitting on circuit in *United States* v. *Cruikshank,* 1 Woods 308, 321, 25 Fed. Cas. 707, 712:

> The language is peculiar. It is composed of two negatives. The right shall *not be denied.* That is, the right *shall be* enjoyed; * * *.

What, then, is the right that everyone shall enjoy? The words "equal protection of the laws" may be read as suggesting that the provision, first, guarantees some measure of legal protection to all persons, and, second, commands that the kind and degree of protection afforded shall be the same for everyone. Indeed, it has been persuasively argued that such was the intent of the framers. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 96–98, 192–206, 221–222. But, whether or not protection and equality are separately guaranteed, the Clause at least intends to assure that the protection of the law shall not be withheld from some while it is given to others. That may well impose an affirmative obligation on the States in some circumstances to take action against private conspiracies directed at a class in the community that would otherwise go unprotected—and, if

the State default (whether or not from inability), federal intervention may be authorized. See 10 U.S.C. 333. In any event, the insertion of the word "protection" makes it clear that the provision guarantees more than equal laws. The concern is with practical equality in legal relations. There is "a practical denial" of equal protection when a law "fair on its face and impartial in appearance" is administered "with an evil eye and an unequal hand." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373–374. So, also, equal protection is withheld when a class of citizens is forcibly prevented from enjoying the benefits of a fair law.

The principle is fully applicable to our case. The Equal Protection Clause enjoins the State to open its facilities to all, without distinction on account of race or color, and to give equal treatment there. That is no more than the requirement of an equal law. But the beneficiaries still have a claim to practical protection in the enjoyment of that "law." At least with respect to its own facilities, the State cannot "abdicate its responsibilities" and permit inequality to flourish through its "inaction." *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725. In short, the right involved here is the equal opportunity to enjoy the State's facilities, the right of Negroes to approach and enter—not merely an immunity from discriminatory treatment at the hands of State officials once they are inside.

b. The Equal Protection Clause grants equality and a right to be protected in its enjoyment. But that

promise is not without limits. We now consider the *area* within which the guarantee operates.

It is immediately apparent that the provision does not govern all relationships, but only those in which the State is involved. The outer perimeter of its concern is the area of conduct regulated by "law", and, even then, the Clause operates only in the relatively narrow zone where there are direct contacts between the "State" and the inhabitant "within its jurisdiction," typically the area of public law—criminal proceedings, taxation, business regulation, the distribution of public benefits and the use of State facilities. There is a wide range of activities to which the Equal Protection Clause has no application, at least so long as the State does not intrude. In this sense, the provision "does not * * * add anything to the rights which one citizen has under the Constitution against another" (*United States* v. *Cruikshank*, 92 U.S. 542, 554–555): "Individual invasion of individual rights is not the subject-matter of the amendment." *Civil Rights Cases*, 109 U.S. 3, 14.

That, it seems to us, is the basic limitation of the Equal Protection Clause: it is concerned only with activities in which the State (through its officers) is a party. Even Congress, exercising its enforcement power cannot expand the scope of the provision in this respect. Such is the holding of the *Civil Rights Cases, supra*, invalidating the Civil Rights Act of 1875 which sought to assert federal jurisdiction over privately owned places of public accommodation, and of *Hodges* v. *United States*, 203 U.S. 1,

repudiating an effort to extend Section 241 of the Criminal Code to protect private contracts of hire. Whatever the viability of those decisions in the changed circumstances of today, there is no comparable problem here. Our case—involving enjoyment of the State's own facilities—falls squarely within the subject-matter of the Amendment.

In short, the Equal Protection Clause states the nature of the right guaranteed—protected equality—and defines the area of constitutional concern—State activities. The rest, it would seem, is left to Congress, empowered by Section 5 of the Amendment to "enforce" the guarantee by "appropriate legislation."

c. We pursue the analysis, however, because, focusing on the words "No State shall * * * deny," it has been intimated that the congressional power comes into play only to "correct" hostile State action, and, therefore, after the fact. See *Civil Rights Cases, supra,* 109 U.S. at 13. As applied to our case, the argument would be that Section 241 reaches too far by checking private acts at a time when the State and its agents have taken no affirmative steps to "deny" the right guaranteed by the Equal Protection Clause. In our view the words announce no such limitation on the power of Congress.

We have already shown that the guarantee is more than a grant of immunity from State imposed discrimination: What is promised is equality of enjoyment and equality of protection within the area affected by the Equal Protection Clause, which the State "denies" when it does not accord it, whatever

the cause. Thus, if the State is unwilling or unable to establish that equality, Congress is free to act although the State itself has taken no hostile action.

The fact is that the notion of congressional power restricted to a reaction to State action developed out of cases very different from ours. It may be the necessary rule for an area of activity which the State does not regulate, for, then, until its officers intervene, the Equal Protection Clause has no application. But there can be no comparable condition when—as with respect to its own facilities—the State is already necessarily involved. Here the right to equality is fully ripened and congressional protection need not await the development of a relationship between the State and the individual: that relationship already exists.

d. The final question is *how* Congress may implement the right secured by the Equal Protection Clause, and, specifically, against whom it may legislate. Because the Equal Protection Clause is, in terms, addressed to the States, it might be supposed that all remedies must bear directly on the State in default. But that is not a necessary reading, nor even the most natural.

That the Equal Protection Clause speaks directly to the States is, of course, directly attributable to the preoccupation with the relationship between the inhabitant and his government. The form of address used delimits the area involved and places primary responsibility where it belongs—on the States. Another consequence of the wording may be that only

the State has capacity to violate the Equal Protection Clause, in the strict sense, and that the unimplemented provision expends itself on the State alone. But there is here no restriction on the means Congress may employ to correct or prevent a State default and right the constitutional wrong. Private individuals may be reached, not because they themselves violate the Constitution, but because they effectively perpetuate or cause a denial of equal protection by the State.

On reflection, it becomes clear that the Equal Protection Clause cannot be read literally as authorizing only an injunction to accord the benefit discriminatorily withheld. For that is seldom a practical solution. The Constitution speaks directly to States, but Congress must find another way of protecting the right which the State will not or cannot effectuate. Thus, from the beginning, the remedy for denial of the right to a nondiscriminatory jury was not to order the State to accord the defendant an impartial jury, but to vacate his conviction (*Strauder* v. *West Virginia,* 100 U.S. 303), or to remove his case to a federal court (*id.*), or, finally, to punish the offending official (*Ex parte Virginia,* 100 U.S. 339; see, also, 18 U.S.C. 242). In other cases, the Equal Protection Clause is "enforced", not by correcting the immediate constitutional wrong, but by awarding damages to the injured party. *E.g., Nixon* v. *Herndon,* 273 U.S. 536; see 42 U.S.C. 1983, 1985(3), 1986. Nor does the remedy always run against the State itself or even against the State officer guilty of discriminating.

Indeed, over strong dissents (Holmes, J., in *Raymond* v. *Chicago Traction Co.*, 207 U.S. 20, 41; Frankfurter, J., in *Snowden* v. *Hughes*, 321 U.S. 1, 13, 16–17; Roberts, J., in *Screws* v. *United States*, 325 U.S. 91, 138–148), it is now settled that an official can be held responsible for violating the Fourteenth Amendment even though his conduct contravenes the authentic command of the State—itself guiltless. See *Monroe* v. *Pape*, 365 U.S. 167. And, except for cases involving criminal liability or accountability in damages, the remedy does not seek out the offender, but, rather, the officer of the State with power to restore constitutional equality. We need only remember that when the State legislators have enacted a discriminatory law, the enforcement of the Equal Protection Clause ignores them and operates against those charged with executing it, however innocent they may be.

To be sure, in most of these cases, the remedy runs against a State officer or a person acting "under color" of State law. But, assuming a constitutional wrong by the State, that is not a necessary condition of relief. The principle is illustrated by the case of removal, which does not bear against the State. And, in truth, the punishment of a State officer who abuses his power, even violates State law, is not a penalty imposed on the State: when he is treated as a criminal, the officer is viewed as a mere individual, no longer an agent of the State.

To deny congressional power to deal effectively with conspiracies aimed at intimidating the beneficiaries of the Fourteenth Amendment into refraining from

the exercise of the rights there declared is to reduce the guarantees of that Amendment (and the Fifteenth, also) to empty exhortations whenever unofficial pressures are interposed between the citizen and his State government, which preserves its clean hands, unable or unwilling to interfere. It is difficult to suppose that those who wrote the Equal Protection Clause meant to confer upon Congress no power whatever to deal with so obvious a barrier to the practical implementation of the newly established constitutional right. That would be inviting vigilantism by putting racists on notice that, if they offered resistance to the enjoyment of these rights, not under color of law but wholly outside the law, they would be immune from federal sanctions. Certainly, nothing in the text of the Equal Protection Clause compels that result. On the contrary, read together with the Enforcement Section of the Amendment, it seems plain Congress was given the necessary power to deal with the problem and has appropriately exercised it in Section 241. It remains to test our conclusion against the available evidence of the intent of the framers of the Fourteenth Amendment.

2. *The contemporary history of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment indicates a purpose to authorize congressional legislation reaching private conspiracies*

The most compelling evidence of the intent of the framers of the Fourteenth Amendment is, of course, to be found in the reports and debates of the Thirty-Ninth Congress which drafted the Amendment and proposed it to the States. But, unfortunately, those

materials contain nothing really conclusive on the point at issue here. See Harris, *The Quest for Equality* (1960), pp. 35–40. The reason is that other questions—ultimately resolved by Sections 2, 3 and 4 of the Amendment—were more controversial at the time and occupied the attention of the Congress. That is not to say that the debates of 1866 foreclose our construction of the Equal Protection Clause and the Enforcement Section. On the contrary, it is clear, as Senator Howard of Michigan emphasized at the time, that the Congress viewed "the first section [of the Amendment], taken in connection with the fifth, as very important" (Cong. Globe, 39th Cong., 1st Sess., p. 2765)—which suggests a broad conception of congressional power to effectuate the guarantees of the Equal Protection Clause against all interference. See Flack, *The Adoption of the Fourteenth Amendment* (1908), pp. 136–139, 277; ten Broek, *The Antislavery Origins of the Fourteenth Amendment* (1951), pp. 213–215; James, *The Framing of the Fourteenth Amendment* (1956), p. 181. Yet, the precise question presented here was never unequivocally resolved and we must turn to other materials for an answer.

Besides the text itself, indications of the original understanding of the scope of congressional power to enforce the Equal Protection Clause are to be found primarily in three sources: (a) the evidence of prevailing conditions submitted to the framers of the Fourteenth Amendment, *i.e.*, conditions which the provision was designed to remedy; (b) congressional legislation enacted at immediately ensuing sessions,

implementing the Fourteenth Amendment or the similarly worded Fifteenth Amendment; and finally, (c) the contemporaneous judicial decisions construing the two Amendments. In each case, the evidence points in the same direction: that Congress was authorized to legislate against private conspiracies in the circumstances envisaged by Section 241.

a. The Fourteenth Amendment must, of course, be "read * * * in connection with the known condition of affairs out of which the occasion for its adoption" arose. *Maxwell* v. *Dow*, 176 U.S. 581, 601–602. Particularly relevant is the evidence of those conditions directly brought to the attention of the framers of the Amendment, for it may reasonably be supposed that their work was meant to correct the evil as they saw it. Accordingly, we turn to the materials before the Thirty-Ninth Congress which adopted the Fourteenth Amendment and its Joint Committee on Reconstruction (or "Committee of Fifteen") which framed the proposal.

There was, first, the report of General Schurz on conditions in the South.[15] It revealed an oppression of the Negro that was not exclusively, or even primarily, official. On the contrary, the report recited murders, beatings and other outrages perpetrated against Negroes and northerners by private individuals, acting singly or in groups,[16] and stressed the need to protect the freedmen from private prosecution

[15] Senate Executive Document No. 2, 39th Cong., 1st Sess.

[16] *Ibid.*, pp. 7–9, 17–20; see also attached documents Nos. 12, 18, 20, 21, 22, 24, 26, 32, 43.

as well as from official oppression. See tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951), p. 164.

The same focus is reflected in the testimony on conditions in the South taken by the Joint Committee on Reconstruction. To be sure, witnesses related instances of discriminatory State legislation[17] and, more frequently, abuse of power by State officials.[18] But by far the greater part of the testimony concerned private wrongs motivated by popular prejudice and hostility toward Negroes,[19] and, to a lesser degree, against Northern whites[20] and Southern whites who had been loyal to the Union.[21] See Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1354–1356. That evidence was widely distributed. The testimony taken by the Joint Committee, together with its report and recommendations, was printed in 100,000 copies for distribution by Congress;[22] excerpts from

[17] Report of the Joint Committee on Reconstruction, 39th Cong., 1st Sess., House Reports, Vol. 2, No. 30 (Government Printing Office, 1866), *e.g.*, pt. II at 218, 269; pt. III at 25, 31, 37, 61, 68, 133, 145, 184; pt. IV at 10.

[18] See, *e.g.*, *id.*, pt. II at 6, 7, 17, 31, 51, 143, 145, 175, 178, 180, 184, 208–211, 215, 216; pt. III at 14, 46, 62, 168–169; pt. IV at 53, 75, 78–81, 142.

[19] See, *e.g.*, *id.*, pt. I at 108, 121; pt. II at 17, 53, 55, 127, 170, 175, 183, 196, 197, 206, 218, 222, 223, 269; pt. III at 3, 5, 7, 8, 10, 17, 37, 78, 141, 143, 146–147, 149, 150, 184, 185; pt. IV at 9, 36, 39, 46–50, 64–65, 75, 81, 83, 88, 125, 153.

[20] See, *e.g.*, *id.*, pt. II at 2, 47, 179, 208, 218; pt. III at 19, 70, 143, 151; pt. IV at 4, 8, 37, 48, 53, 55, 60, 67, 73, 79, 81.

[21] See, *e.g.*, *id.*, pt. II at 17, 43, 47, 110, 153, 171, 207, 269; pt. III at 7, 61, 70, 78, 168–169; pt. IV at 60, 66, 73.

[22] Cong. Globe, 39th Cong., 1st Sess., pp. 3325, 3326.

the daily testimony were published and commented upon in the northern press;[23] and it is probable that the evidence gathered by the Committee was repeatedly invoked when the Republican Party campaigned in 1866 on a platform consisting of the Fourteenth Amendment and the Civil Rights Bill.[24]

The inference is compelling that not only the Joint Committee, but Congress as a whole, and also the ratifying legislatures, regarded the Fourteenth Amendment as empowering Congress to deal effectively with the atrocities depicted in the testimony.

b. A further indication of the original understanding is to be found in the legislation enacted by Congress almost contemporaneously with the adoption of the Fourteenth and Fifteenth Amendments, particularly the Enforcement Act of May 31, 1870 (16 Stat. 140) and the Ku Klux Klan Act of April 20, 1871 (17 Stat. 13).

There is, of course, no doubt that those enactments reached private conduct. Section 6 of the Act of 1870 is the predecessor of our Section 241, which, as we have shown (*supra,* pp. 13–15), was plainly intended to deal with unofficial conspiracies interfering with the rights secured by both the Fourteenth and Fifteenth Amendments. Section 5 of the same measure was aimed at "any person" who intimidates another "to whom the right of suffrage is secured or guaranteed by the Fifteenth Amendment" with respect to his right to vote. And the criminal

[23] Kendrick, *Journal of the Joint Committee of Fifteen on Reconstruction* (1914), p. 265.

[24] See Frantz, *supra*, at p. 1355.

provisions of the Act of 1871 were construed as reaching private individuals in *United States* v. *Harris*, 106 U.S. 629. The question is whether that legislation accurately translates the intent of the framers of the Fourteenth and Fifteenth Amendment with respect to the enforcement power of Congress.

The presumption is that it does, because almost contemporaneous with the Amendments—the enactment of the Enforcement Act of 1870 (May 31) coming only two months after the ratification of the Fifteenth Amendment, on March 30, 1870 (16 Stat. 1131). But there is a closer connection: the legislators who wrote the Acts of 1870 and 1871 were in large measure the very framers of the Fourteenth and Fifteenth Amendments. Cf. *Bors* v. *Preston*, 111 U.S. 252, 256–257. Thus, of the 33 Senators and 120 Representatives who had voted in favor of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess., pp. 3042, 3148–3149) 15 Senators and 32 Representatives were present when the bill which became the Act of May 31, 1870 (the Enforcement Act) came to a vote in the 41st Congress, and all of them, save only one Representative, voted in favor of the measure. Cong. Globe, 41st Cong., 2d Sess., pp. 3809, 3884; Biographical Directory of the American Congress, 1774–1961, pp. 182–185, 191–195. In addition, three former representatives had become Senators and all three voted for the bill. *Ibid.* And, perhaps even more significant, all seven of the fifteen members of the Joint Committee on Reconstruction which had drafted the Fourteenth Amendment who had con-

curred in the Joint Committee's Report and who still remained in Congress (Howard, Harris, Williams, Stevens, Bingham, Morrill and Washburn) supported the bill. Black, *The Adoption of the Fourteenth Amendment,* p. 60; Cong. Globe, 41st Cong. 2d Sess., p. 3809; Biographical Directory of the American Congress, 1774–1961, pp. 191–195.[25] Similarly, eleven of the twelve Senators and all of the eleven Representatives who had voted for the Fourteenth Amendment and who were present when the bill which became the Ku Klux Klan Act came to a vote cast their votes in favor of the bill. Cong. Globe, 42d Cong., 1st Sess., pp. 808, 831.[26]

Most compelling of all, however, is the participation in the enactment of the Act of 1870—which primarily enforced the Fifteenth Amendment—of legislators who had voted in favor of the Fifteenth Amendment. Of 39 Senators who had favored the Amendment (Cong. Globe, 40th Cong., 3d Sess., p. 1641), 28—more than two-thirds—remained and *all* voted in favor of the statute (Cong. Globe, 41st Cong., 2d Sess., p. 3809); and all 63 (out of 144) members of the House still present likewise supported the Enforcement Act (Cong. Globe, 40th Cong., 3d Sess., pp. 1563–1564; *id.*, 41st Cong., 2d Sess., p. 3884). It is thus apparent that the framers of the Fifteenth

[25] The only remaining member of the Joint Committee who voted against the Enforcement Act was Representative Rogers, a Democrat, who had opposed the Report of the Joint Committee and had voted against the Fourteenth Amendment. *Ibid.*

[26] One former Representative voted as a Senator and one former Senator voted as a Representative.

Amendment thought it authorized legislation reaching private conspiracies. See Mathews, *Legislative and Judicial History of the Fifteenth Amendment* (1909), pp. 78–96. If that be so, there is no basis for giving a different construction to the similarly worded Fourteenth Amendment.

This concurrence of votes (with only two exceptions) is more than a coincidence. It would be extraordinary to suppose that many or most of the legislators who remained had changed their minds. Indeed, Representative Bingham, the chief artisan of the Equal Protection Clause and the Enforcement Section of the Fourteenth Amendment expressly defended the Ku Klux Klan bill of 1871 as implementing his own understanding of 1866. Cong.. Globe, 42d Cong., 1st Sess., App., p. 55. Nor can we lightly assume that members of Congress would knowingly overstep the boundaries of constitutional power which they themselves had participated in fixing. The natural inference is that the legislation of 1870 and 1871 carries out the Fourteenth and Fifteenth Amendments in a wholly legitimate exercise of power which had been given earlier and was now invoked because lesser remedies had not succeeded in curing the evil.

c. The earliest judicial decisions sustained congressional power to protect the rights which the Fourteenth and Fifteenth Amendments secure against private encroachment. Their proximity to the Amendments suggests that they accurately translate the original understanding.

One of the first cases was *United States* v. *Hall,* 26 Fed. Cas. 79 (S.D. Ala. 1871), decided by Judge Woods, afterwards a Justice of this Court and its spokesman in *United States* v. *Harris,* 106 U.S. 629. The charge was laid under Section 6 of the Enforcement Act of 1870 (now 18 U.S.C. 241) and it was alleged that the defendants—not claimed to be State officers—had conspired to injure, "oppress, threaten and intimidate" certain citizens of the United States to prevent their free exercise and enjoyment of the rights of freedom of speech and peaceable assembly. The defendants demurred to the indictment and questioned the power of Congress to enact Section 6. 26 Fed. Cas. at 80. Quoting the Equal Protection Clause and noting that Congress is given an express power to enforce it, the court declared (26 Fed. Cas. at 81):

> From these provisions it follows clearly, as it seems to us, that congress has the power, by appropriate legislation, to protect the fundamental rights of citizens of the United States against unfriendly or insufficient state legislation, for the fourteenth amendment not only prohibits the making or enforcing of laws which shall abridge the privileges of the citizen, but prohibits the states from denying to all persons within its jurisdiction the equal protection of the laws. Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection. The citizen of the United States is entitled to the enforcement of the laws for the protection of his fundamental rights, as well as

> the enactment of such laws. Therefore, to guard against the invasion of the citizen's fundamental rights, and to insure their adequate protection, as well against state legislation as state inaction, or incompetency, the amendment gives congress the power to enforce its provisions by appropriate legislation. And as it would be unseemly for Congress to interfere directly with state enactments, and as it cannot compel the activity of state officials, the only appropriate legislation it can make is that which will operate directly on offenders and offenses, and protect the rights which the amendment secures.

Judge Woods upheld the charge even though the underlying statute was not limited to take effect only where particular State legislation was "unfriendly" or "insufficient" or where a particular State was "incompetent", and even though the indictment contained no such allegation with respect to the State of Alabama or the community where the offense had occurred. He reasoned that "[t]he extent to which Congress shall exercise this power must depend *on its discretion* in view of the circumstances of each case." *Ibid.* (emphasis added). Section 6 was "appropriate to the end in view, namely, the protection of the fundamental rights of citizens of the United States." 26 Fed. Cas. at 82. See, also, *United States* v. *Mall*, 26 Fed. Cas. 1147 (S.D. Ala.).

In 1873, two years after the decision in *Hall*, Mr. Justice Strong—later the author of this Court's opinions in three Fourteenth Amendment cases de-

cided in 1880 [27]—handed down an opinion on circuit in *United States* v. *Given*, 25 Fed. Cas. 1324 (D. Del.), dealing with congressional enforcement power under the Fifteenth Amendment. A State official had been convicted under Section 2 of the Enforcement Act of 1870, which punished the refusal, on racial grounds, to permit any citizen to perform any act necessary to become a qualified voter. 16 Stat. 140. The defendant filed a motion in arrest of judgment, arguing that the statute was unconstitutional. In rejecting this claim, Mr. Justice Strong did not rely upon the presence of "State action." Rather, he reasoned that the "primary object" of the Fifteenth Amendment (as well as the Thirteenth and Fourteenth Amendments), was "to secure to persons certain rights which they had not previously possessed," [28] and to protect those rights "against any infringement *from any quarter.*" 25 Fed. Cas. 1325, 1326 (emphasis added). Mr. Justice Strong elaborated (25 Fed. Cas. at 1327):

[27] *Strauder* v. *West Virginia*, 100 U.S. 303; *Virginia* v. *Rives*, 100 U.S. 313; *Ex parte Virginia*, 100 U.S. 339.

[28] "The Thirteenth, Fourteenth, and Fifteenth Amendments of the Constitution have confessedly extended civil and political rights, and, I think, they have enlarged the powers of Congress. The primary object of the Thirteenth, and of the First sections of the Fourteenth and Fifteenth Amendments was to secure to persons certain rights which they had not previously possessed * * *. It is true that the (15th) amendment is in form a prohibition upon the United States, and upon the states, but it is not the less on that account an assertion of a constitutional right belonging to citizens as such. Surely it cannot be maintained that it conferred no rights upon persons."

> It was well known when [the Fifteenth Amendment] was adopted that in many quarters it was regarded with great disfavor. It might well have been anticipated that it would meet with evasion and hindrances, not from state legislatures, for their affirmative action was rendered powerless by it, or not from a state's judiciary, for their judgments denying the right were reviewable by federal courts, but by *private persons* and ministerial officers, officers, by assessors, collectors, boards of registration, or election officers. And it might have been foreseen that by these agencies a right intended to be substantial could become *incapable of full enjoyment* * * *. Earlier prohibitions to the states were left without any express power of interference by congress; but these later, *encountering so much popular prejudice* and working changes so radical, were fortified by grants to congress of power to carry them into full effect—that is, to enact any laws appropriate to give *reality* to the rights declared [emphasis added].

See, also, the opinion of Judge Bradford, delivered in the same case. 25 Fed. Cas. 1328–1329.

Another significant opinion is that delivered on circuit by Mr. Justice Bradley (who was to write the Court's opinion in the *Civil Rights Cases,* 109 U.S. 3) in *United States* v. *Cruikshank,* 1 Woods 308, 25 Fed. Cas. 707. The Circuit Justice expressed his view that the Fourteenth Amendment did not empower Congress "to pass laws for the general preservation of social order in every state," and that the Due Process Clause, in particular, was "not intended

as a guaranty against the commission of murder, false imprisonment, robbery or any other crime committed by individual malefactors, so as to give congress the power to pass laws for the punishment of such crimes in the several states generally." 1 Woods at 316. And he accordingly held the charge against private conspirators insufficient insofar as it alleged invasion of due process rights. But, although he found the indictment defective for failure to allege a racial motive, the Justice took a different view of the power of Congress to reach private encroachment upon rights secured by the Fifteenth Amendment—which, it seems to us, is equally applicable to enforcement of the Equal Protection Clause. Speaking of the Fifteenth Amendment, he said (1 Woods 324):

> Considering, as before intimated, that the amendment, notwithstanding its negative form, substantially guaranties the equal right to vote to citizens of every race and color, I am inclined to the opinion that congress has the power to secure that right not only as against the unfriendly operation of state laws, but against outrage, violence, and combinations on the part of individuals, irrespective of the state laws. Such was the opinion of congress itself in passing the law at a time when many of its members were the same who had consulted upon the original form of the amendment in proposing it to the states. And as such a construction of the amendment is admissible, and the question is one at least of grave doubt, it would be assuming a great deal for this court to decide the law, to the extent indicated, unconstitutional.

It is needless to say that the opinions just recited are not offered as binding precedents; indeed, in one case (*Hall*) the ruling goes somewhat farther than our argument. We submit the cases, rather, as persuasive evidence of the original understanding of the Amendments to which they are most proximate in time. Perhaps the philosophy of those early opinions, in some measure, has been repudiated or qualified by later decisions of this Court. Yet, it is important to emphasize that no subsequent case here need be read as disapproving the doctrine of the quoted opinions insofar as it applies to the circumstances in suit—the principle that Congress may enforce the guarantee of equal protection with respect to State-owned or State-operated public facilities by punishing private conspiracies intimidating Negroes out of their right to enjoy those benefits equally with white persons.

3. *No decision of this Court forecloses a construction of the Equal Protection Clause and the Fifth Section of the Fourteenth Amendment that would authorize congressional legislation reaching private conspiracies in the circumstances of the present case*

To be sure (as we have already noticed, *supra*, p. 19), there are statements in opinions of the Court which seem opposed to the interpretation of the Enforcement Section of the Fourteenth Amendment for which we contend. We do not discount the weight of those expressions by distinguished Justices. But they may properly be characterized as *dicta:* the fact is that acceptance of our limited submission with

respect to the power of Congress to enforce the guaranties of the Equal Protection Clause as against private interference does not require overruling any decision in this Court.

Certainly, nothing in the *Slaughter-House Cases,* 16 Wall. 36, undermines our argument. On the contrary, so far as that decision treats of the Equal Protection Clause and the power of Congress to enforce its guarantee, it suggests that legislation may appropriately reach private acts against the rights of Negroes; for it is said (apparently with reference to the Equal Protection Clause) that the Fourteenth Amendment was intended to secure "the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him" (*id.* at 71). Nor is the decision in *United States* v. *Reese,* 92 U.S. 214, hostile to our submission. The Court there invalidated Sections 3 and 4 of the Enforcement Act of 1870, which purported to implement the Fifteenth Amendment, on the ground that they were not properly confined to interference with the right to vote for reasons of color or race. That is, of course, wholly irrelevant to our case. But it is perhaps instructive that, although the decision goes beyond the facts of the case to condemn the provisions of the Act of 1870 for reaching too far, the Court did not criticize Section 4 because it punished private acts of intimidation. Indeed, as late as *Ex parte Yarbrough,* 110 U.S. 651, the Court apparently assumed that the "right to be protected against discrimination" in voting guaranteed

by the Fifteenth Amendment might be "kept free and pure by congressional enactments" punishing private interference. *Id.* at 664–665. The contrary was never asserted by this Court until *James* v. *Bowman*, 190 U.S. 127, 136–139, and then only as an alternative ground for dismissing an indictment that was, in any event, defective under *Reese* for failure to allege a racially discriminating purpose. *Id.* at 139–142.

This Court's decision in *United States* v. *Cruikshank*, 92 U.S. 542, is more in point and some of the language of the opinion might be read adversely to our contention. The Court does seem to hold that Congress cannot implement the Due Process Clause by making an ordinary private "conspiracy to falsely imprison and murder citizens" a federal crime. *Id.* at 553–554. That is probably also the rationale of this Court's *per curiam* decision in *United States* v. *Powell*, 212 U.S. 564, affirming the dismissal of a charge of lynching a Negro. But when it comes to the counts of the indictment charging a denial of equal protection and a denial of the right to vote, they are dismissed not because federal legislation enforcing the Equal Protection Clause and the Fifteenth Amendment can never reach private acts, but only because the charge failed to allege an intent to effect a discrimination on account of race or color. *Id.* at 554–556. Similarly, the landmark cases of 1880, *Strauder* v. *West Virginia*, 100 U.S. 303; *Virginia* v. *Rives*, 100 U.S. 313, and *Ex parte Virginia*, 100 U.S. 339, do not resolve the question here. To be sure, they articulated the "State action" concept, but that was a reply

to the contention that congressional legislation could not reach State officials. See the dissenting opinion of Mr. Justice Field, *id.* at 349, 353. The ruling of the Court was not a restrictive one; it found State officers of every category amenable to the Fourteenth Amendment, without purporting to decide whether Congress might also reach private persons in certain circumstances.

Concededly, some of the language of the Court's opinion in the *Civil Rights Cases,* 109 U.S. 103, seems opposed to our conclusion. But that decision, dealing with privately-owned places of public accommodation, like *Hodges* v. *United States,* 203 U.S. 1, involving an employment contract, may be explained on the ground that the underlying relationships, then viewed as purely private, where wholly outside the area governed by the Equal Protection Clause. It has been pointed out that the opinion itself does not foreclose congressional legislation reaching private conspiracies in all circumstances. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts,* 72 Yale L.J. 1353, 1377–1381. In any event, the result is not inconsistent with our submission.

There remains the case of *United States* v. *Harris,* 106 U.S. 629, which held unconstitutional a section of the Ku Klux Klan Act of 1871 punishing private conspiracies formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges under the laws, or for the purpose of hindering the constituted authorities of any State or Ter-

ritory from giving or securing to all persons within the State or Territory the equal protection of the laws." On its face, that statute is very similar to Section 241 insofar as it protects the right guaranteed by the Equal Protection Clause. But the Court construed the provision much more broadly than we do Section 241. Indeed, the indictment—which was said to be "a good indictment under the law if the law itself were valid" (*id.* at 639)—charged the lynching of a prisoner and a denial of protection from violence at the hands of a mob, without alleging any racial or discriminatory purpose. It is doubtful if the right recited is one arising under the Equal Protection Clause at all; today, at least, it would seem more a claim under the Due Process Clause—which we do not argue may be protected against private conspiracies. But, in any event, the factual situation bears no resemblance to the instant case; *Harris* is, in effect, the same case as *Cruikshank* and *Powell,* and the doctrine of *Reese* required invalidating a statute that reached so far, even if it might properly operate in a narrower radius. In sum, although some of the broad language of the opinion is hostile to our submission (see *id.* at 637–640), *Harris* may stand consistently with a ruling upholding the present indictment insofar as it charges a conspiracy to intimidate Negroes ~~or~~ OUT of asserting their right to the equal utilization of public facilities owned or operated by the State.

So far as we are aware, there are no more recent cases in this Court that bear on the question. To be sure, it has been reiterated that "the action inhibited

by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States." *E.g., Shelley* v. *Kraemer,* 334 U.S. 1, 13. But such statements may fairly be read as defining only the self-executing force of the Amendment, unaided by implementing legislation. There has been no occasion in recent years to consider the scope of the congressional power to enforce the guarantee of the Equal Protection Clause against private conspiracies. After *Harris,* the criminal sanctions of the Ku Klux Klan Act of 1871 were no longer available and the ruling in *United States* v. *Williams,* 341 U.S. 70, seemed to foreclose prosecutions of this character under Section 241 of the Criminal Code. The civil remedy provided by the Act of 1871—now 42 U.S.C. 1985(3)—was before the Court in *Collins* v. *Hardyman,* 341 U.S. 651, but the constitutional question was avoided and the circumstances alleged there were, in any event, more like *Harris* than the present case. The only comparable modern statute is 42 U.S.C. 1971(c)—part of the Civil Rights Act of 1957—authorizing the Attorney General to seek injunctive relief against invasion of the right guaranteed by the Fifteenth Amendment by "any person"—which presumably includes private individuals. But when the question of its constitutionality came here in *United States* v. *Raines,* 362 U.S. 17, the Court found it unnecessary to decide whether the provision could validly operate with respect to private acts.

We conclude that no authoritative precedent stands in the way of a construction of Section 241 which

implements the fundamental purpose of the Equal Protection Clause.

II

SECTION 241 REACHES CONSPIRACIES AGAINST THE EXERCISE OF THE RIGHTS TO TRAVEL FREELY TO AND FROM ANY STATE AND TO USE THE INSTRUMENTALITIES OF INTERSTATE COMMERCE

Even under the most restrictive view of Section 241, "rights which arise from the relationship of the individual to the Federal Government" are within its purview. *United States* v. *Williams,* 341 U.S. 70, 77 (Frankfurter, J.); *Ex parte Yarbrough,* 110 U.S. 651. In that category, we submit, are rights mentioned in paragraph four of the present indictment, which alleges a conspiracy to injure, oppress, threaten and intimidate Negro citizens in the free exercise and enjoyment of their rights "to travel freely to and from the State of Georgia" and to use highway facilities and other instrumentalities of interstate commerce within the State of Georgia" (*supra,* p. 6).

Following this Court's ruling in *In re Quarles,* 158 U.S. 532, 535, that "[e]very right created by or arising under or dependent upon the Constitution may be protected and enforced" as Congress deems proper, the circuit court in *United States* v. *Moore,* 129 Fed. 630 (N.D. Ala.), enumerated those rights which it believed were afforded protection in Section 241 (then Rev. Stat. 5508). Included were "the right to engage in interstate commerce," and "the right to pass from one state to any other for any lawful purpose." 129 Fed.

at 633."[29] That conclusion was firmly based in prior decisions of this Court, and the more recent cases continue to sustain its validity.

A. In *Crandall* v. *Nevada*, 6 Wall. 35, this Court invalidated a State tax on "every person leaving the State by" common carrier. Expressly refusing to place sole reliance on any specific provisions of the Constitution, the Court held (6 Wall. at 49) that the governing principle, inferred from the Constitution as a whole, was that stated by Chief Justice Taney in *The Passenger Cases*, 7 How. 283, 492: "We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."

The view expressed in *Crandall* has persisted to this day. See, *e.g.*, *Williams* v. *Fears*, 179 U.S. 270, 274; *Twining* v. *New Jersey*, 211 U.S. 78, 97; *Edwards* v. *California*, 314 U.S. 160, 177 (Douglas, J.), 182–186 (Jackson, J.); *New York* v. *O'Neill*, 359 U.S. 1, 6–7 (opinion of the Court), 12–14 (Douglas, J.). See, also, *Bell v. Maryland*, 378 U.S. 226, 249–252 (Douglas J.), 293–294 and n. 10 (Goldberg, J.). In *Twining*, the Court catalogued a number of the rights which had been recognized as arising "out of the nature and essential character of the National Government," including "the right to pass freely from State to State, [recognized in] *Crandall* v. *Nevada* * * *" (211 U.S. at 97). It is particularly signifi-

[29] The list also included "the right to go to and return from the seat of government" (*ibid.*).

cant that all of the rights which the Court placed in the same category with the right to free ingress and egress were rights recognized in prosecutions of private conspiracies under the predecessors of Section 241.[30] Although the majority in *Edwards* v. *California, supra,* preferred to rest its decision on the Commerce Clause, four Justices expressed the view that the decision—invalidating a statute prohibiting bringing indigents into the State—should be grounded in "the right of persons to move freely from State to State." 314 U.S. at 177 (Douglas, J.). Mr. Justice Jackson, pointing out that aliens admitted to this country have the privilege of entering and abiding in any State in the Union, *Truax* v. *Raich,* 239 U.S. 33, 39, reasoned "that federal citizenship implies rights to enter and abide in any state of the Union at least equal to those possessed by aliens * * *" (314 U.S. at 184).

[30] The catalogue of federal citizenship rights presented by this Court in *Twining* is as follows (211 U.S. at 97–98):

> Thus among the rights and privileges of National citizenship recognized by this court are the right to pass freely from State to State, *Crandall* v. *Nevada,* 6 Wall. 35; the right to petition Congress for a redress of grievances, *United States* v. *Cruikshank, supra;* the right to vote for National officers, *Ex parte Yarbrough,* 110 U.S. 651; *Wiley* v. *Sinkler,* 179 U.S. 58; the right to enter the public lands, *United States* v. *Waddell,* 112 U.S. 76; the right to be protected against violence while in the lawful custody of a United States marshal, *Logan* v. *United States,* 144 U.S. 263; and the right to inform the United States authorities of violation of its laws, *In re Quarles,* 158 U.S. 532. Most of these cases were indictments against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States * * *.

United States v. *Wheeler*, 254 U.S. 281, relied on by the court below (R. 33), is not controlling here. In *Wheeler*, the United States brought a prosecution under the predecessor of 18 U.S.C. 241 against the participants in a conspiracy to seize United States citizens residing in Arizona and remove them from the State. The right to travel freely from State to State was not involved. Rather the indictment charged the defendants with interfering with "the right and privilege pertaining to citizens of said State *to reside and remain* therein and *to be immune from unlawful deportation* from that State to another" (254 U.S. at 292, emphasis added). Although the opinion contains broader *dictum*, the Court merely held that a conspiracy to deprive citizens of their right *to reside in a particular State* was not an offense under Section 241, because only a right of State citizenship was involved. See *Edwards* v. *California*, 314 U.S. 160, 180 (Douglas, J.), deseribing *Wheeler* as involving "the incidents of residence"; *United States* v. *Williams*, 341 U.S. 70, 80 (Frankfurter, J.), stating that *Wheeler* involved a conspiracy to compel citizens "to move out of a State." The language in *Wheeler* relied upon by the court below was not necessary to the decision and, we submit, should not be followed.

The right to travel freely among the States is not expressly mentioned in the Constitution. Article IV of the Articles of Confederation, however, provided that "the people of each State shall have free ingress and regress to and from any other State." Noting that some of the other language in the Article was

carried over into Article IV, Section 2 of the Constitution, Chief Justice White in *Wheeler* inferred that the right to free ingress and egress was likewise carried over and entrusted to the protection of the States under that constitutional provision. But the more logical inference, it seems to us, is that the omitted clause was not intended to be within the ambit of the Constitution's Article IV. The provision for the right of free travel from State to State during the Confederation was in the nature of comity between entities which, according to Article II of the Articles of Confederation, retained their "sovereignty, freedom, and independence."[21] The formation of the federal Union involved, of necessity, greater cohesion among the States. As Professor Chafee has pointed out, the reason no specific provision was made in the Constitution for the right to travel freely throughout the country must have been that it was assumed, in light of the essential nature of the Union, that such a right was already included. Chafee, *Three Human Rights in the Con-*

[21] Even though the Articles of Confederation were submitted to the States in 1777 and all but Maryland ratified them by 1779, the several States continued during the Revolution to issue their own passports. This embarrassed travel and complicated long distance shipment of provisions for the Continental Army. 12 J. Cont. Cong. 861, 862 (Sept. 2, 1778, Lib. of Cong. 1908). Congress also issued passports, and when one of them was dishonored by citizens of Pennsylvania, a sharp argument arose whether Congressional passports had to be recognized (25 J. Cont. Cong. 859, 897, Jan. 24 & Feb. 13, 1783, Lib. of Congress 1922).

stitution 185 (1956)."[22] The right is multistate by its very nature. It is not linked to any State sovereignty but has its source in the union of all the States. It follows, we suggest, that a conspiracy to interfere with the right to pass freely from State to State is an offense, not only to the individuals directly involved, but to the federal Union itself.

B. Closely related to the right to travel freely from State to State is the right to use the highways and other instrumentalities of interstate commerce. It, too, we submit, is protected by Section 241—even accepting the most restrictive interpretation—because it is a right "arising from the substantive powers of the Federal Government"—under the Commerce Clause—"which Congress can beyond doubt secure against interference by private individuals." *United States* v. *Williams*, 341 U.S. 70, 73, 77 (Frankfurter, J.).

It is well settled that the federal commerce power embraces the movement of persons, as well as commodities, on the instrumentalities of interstate com-

[22] Also in *dictum*, the Court in *Wheeler* sought to distinguish *Crandall* v. *Nevada* on the ground that the decision was based upon the view that Nevada's tax "was held directly to burden the performance by the United States of its governmental functions and also to limit the rights of the citizens growing out of such functions * * *." (254 U.S. at 299). But, as Mr. Justice Douglas pointed out in *Edwards* v. *California*, 314 U.S. 160, 178: "[T]here is not a shred of evidence in the record of the *Crandall* case that the persons there involved were en route on any such mission * * *. The point which Mr. Justice Miller made was merely an illustration of the damage and havoc which would ensue if the States had the power to prevent the free movement of citizens from one State to another."

merce. *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U.S. 196, 203; *Covington & Cincinnati Bridge Co.* v. *Kentucky,* 154 U.S. 204, 218–219; *Hoke* v. *United States,* 227 U.S. 308, 310; *United States* v. *Hill,* 248 U.S. 420, 423; *Edwards* v. *California,* 314 U.S. 160, 172. And Congress may, of course, exercise that power to protect individuals from private interference with free interstate movement (*Mitchell* v. *United States,* 313 U.S. 80; *Henderson* v. *United States,* 339 U.S. 814; cf. *Brooks* v. *United States,* 199 F. 2d 336 (C.A. 5) (interstate lynching)), or from violations of civil rights which, while local in nature, affect interstate commerce (*Boynton* v. *Virginia,* 364 U.S. 454; *Katzenbach* v. *McClung,* 379 U.S. 294). But, even in the absence of legislation, the Commerce Clause has a force of its own. In some circumstances, it authorizes executive action to eliminate private obstructions to the instrumentalities of commerce. *In re Debs,* 158 U.S. 564, 586. Moreover, the clause has been held to invalidate, by its own force, private acts or practices which interfere with interstate movement. *Chance* v. *Lambeth,* 186 F. 2d 879 (C.A. 4), certiorari denied, 344 U.S. 877; *Whiteside* v. *Southern Bus Lines, Inc.,* 177 F. 2d 949 (segregation by interstate carrier); *United States* v. *U.S. Klans,* 194 F. Supp. 897 (M.D. Ala.) (private interference with interstate travel of "Freedom Riders"). Whatever the full scope of the Commerce Clause, it must at least grant the bare right to use the highways and other instrumen-

talities of interstate commerce. We submit, as stated in *United States* v. *Moore*, 129 Fed. 630, 631–632 (C.C. N.D. Ala.), that the right alleged here is one "created by or arising under or dependent upon the Constitution" and is therefore protected by Section 241.

So saying, we do not suggest an undue enlargement of federal criminal jurisdiction. Our contention here—no more than our argument under Point I—does not involve wholesale supersession or duplication of the municipal laws of the States. That Section 241 emcompasses the rights freely to pass from State to State and to use the instrumentalities of interstate commerce does not mean that every crime—violent or otherwise—committed on a highway or incidently affecting the use of a highway or other instrumentality of commerce is punishable under federal law. A specific intent to interfere with the use of such instrumentalities must be shown. A conspiracy to assault an interstate traveler, for example, would not, without more, violate Section 241. But conspiracies aimed at establishing a zone of restricted travel on the basis of race or preventing "outsiders" from entering a certain community—both of which are covered by the present indictment [33]—are plainly within the reach of the statute.

[33] These situations are merely illustrative and are not intended to indicate what the government will attempt to prove if the case goes to trial.

III

SECTION 241 REACHES CONSPIRACIES AGAINST THE EXERCISE OF RIGHTS SECURED BY TITLE II OF THE CIVIL RIGHTS ACT OF 1964

Tracking the language of Section 201(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000a(a), the first paragraph of the indictment charges a conspiracy to oppress Negro citizens in the exercise of their right, granted by that statute, "to the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations" of restaurants, motion picture theaters and other privately owned places of public accommodation. Whether or not it has an independent source in the Equal Protection Clause of the Fourteenth Amendment (see *Bell* v. *Maryland,* 378 U.S. 226, 245–255 (Douglas, J.), 286–317 (Goldberg, J.), 326–346 (Black, J.)) or is an incident of national citizenship (*id.* at 250 (Douglas, J.), 294 (Goldberg, J.)), the right to equal enjoyment of places of public accommodation is expressly conferred by positive legislation implementing the Commerce Clause (see *Atlanta Motel* v. *United States,* 379 U.S. 241). As a right "that flow[s] from the substantive powers of the Federal Government," it "may clearly be protected from private interference." *United States* v. *Williams,* 341 U.S. 70, 78 (Frankfurter, J.); *United States* v. *Waddell,* 112 U.S. 76. Thus, even under the most restrictive view of the scope of Section 241,[34] the allegation of a private conspiracy

[34] The labor cases cited by the court below (R. 31) have no bearing on this point. *United States* v. *Moore*, 129 Fed. 639 (C.C.N.D. Ala.), decided long before the passage of the

aimed, in part, against the free exercise of rights granted by the public accommodations title of the Civil Rights Act of 1964 [35] states an offense within the former provision.

There are only two possible obstacles. The first is peculiar to this case and relates to the sufficiency of

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National Labor Relations Act, did not involve any statutory right; it held simply that the right to organize labor unions was not one of the privileges and immunities of national citizenship. *United States* v. *Bailes*, 120 F. Supp. 604 (S.D. W. Va.), held that the right not to form labor unions was not dependent on the laws or Constitution of the United States since it existed before the Constitution was framed and that, in any event, the Labor Management Relations Act did not give employees any rights against persons acting in their individual capacities. *United States* v. *Berke Cake Co.*, 50 F. Supp. 311 (E.D.N.Y.), seems to hold that only rights secured by the Fourteenth or Fifteenth Amendments are protected by Section 241. But this position is plainly contrary to *United States* v. *Waddell*, 112 U.S. 76 (upholding prosecution for conspiracy to interfere with rights granted under the Homestead Acts).

[35] The failure of the indictment specifically to allege that the places of public accommodation referred to are covered by the Act is of no significance. It is clear, as the district court itself noted, that the draftsman of that part of the indictment relied on and intended to invoke Title II (see R. 32). Moreover, it is difficult to conceive of a restaurant that is not a covered establishment. See *Katzenbach* v. *McClung*, 379 U.S. 294, 298, 301–305; *Hamm* v. *Rock Hill*, 379 U.S. 306, 309–310. And, plainly, all motion picture theaters in Athens, Georgia, are covered. See § 201(c)(3) of the Act, 42 U.S.C. 2000a(c)(3). Of course, at trial, the government must show that the conspirators sought to prevent Negroes from asserting their right to enter, or to be served at, establishments covered by the Act. The indictment, we submit, fairly apprises them of the charge. In any event, no such pleading objection was raised or noticed below and the question is not open on this direct appeal.

the present indictment; it is relevant here only insofar as it affects the jurisdiction of this Court on direct appeal. The other objection is more basic: the proposition is that the Civil Rights Act of 1964, in creating a right to nondiscriminatory treatment in places of public accommodation, provided for enforcement only by equitable proceedings—no matter what the circumstances—and thus precluded a criminal prosecution.

A. Appellees may argue that this Court lacks the power to consider the issues discussed in this section of our brief because of the district court's comment that: "It is not clear how the rights mentioned in paragraph one can be said to come from the [1964] Act because § 201(a), *upon which the draftsman doubtless relied,* lists the essential element 'without discrimination or segregation on the ground of race, color, religion, or national origin.'" (Emphasis added.) Noting that the phrase quoted from the Act was not used in the indictment, the court stated that the omission was a defect "not in form, but in substance."[36] Although the import of this comment is not clear, it certainly need not be read to restrict this Court's authority to resolve any of the important questions raised by this appeal.

The indictment obtained by the United States in this case charges in a single count that appellees entered into a conspiracy to oppress Negroes in the enjoyment of four specified rights.[37] The district

[36] Quoting from *United States* v. *Cruikshank*, 92 U.S. 542, 556.

[37] The United States conceded that paragraph 5 of the indictment charging interference with "other rights * * *" adds nothing to the indictment.

court dismissed the indictment on the ground that Section 241 does not reach conspiracies aimed at interfering with *any one* of these rights. In so holding, the district court stated (R. 31–32):

> "This court is convinced that the five numerical paragraphs of rights and privileges set forth in this indictment are not federal citizenship rights and privileges; not "federal rights and privileges which appertain to citizens as such", 179 F. 2d at 648, *and do not come within the scope of § 241.* * * * Insofar as said five paragraphs of rights and privileges embrace the right to be free from discrimination by reason of race or color, such rights are Fourteenth Amendment rights, which, as we have seen, *are not emcompassed by § 241.* [Emphasis supplied.]

Alternatively, the court held that "any broader construction of § 241 * * * would render it void for indefiniteness" (R. 36). The decision of the district court, therefore, is "a decision * * * dismissing [an] indictment * * * based upon the invalidity or construction of the statute upon which the indictment * * * is founded,"[35] clearly giving this Court jurisdiction on direct appeal under 18 U.S.C. 3731.

The dictum in *United States* v. *Borden Co.*, 308 U.S. 188, 193, that "[t]his Court must accept the construction given to the indictment by the District Court

[35] Arguably, the decision is also a "judgment sustaining a motion in bar, when the defendant has not been put in jeopardy," likewise directly appealable to this Court. See *United States* v. *Mersky*, 361 U.S. 431, 441–443 (Brennan, J. concurring), 444 (Whittaker, J., concurring). But see *id.* at 452 (Frankfurter, J., dissenting), 455–458 (Stewart, J., dissenting).

* * *," has no application here. In the first place, it is not entirely clear that the court below construed the indictment as failing to invoke rights granted in the public accommodations act; although noting what he viewed as an omission in the pleadings, the trial judge made it plain that he understood what "the draftsman doubtless" meant to change.[39] Moreover, the statement in *Borden* should be read in light of Mr. Justice Jackson's later comment in *United States* v. *Swift & Co.*, 318 U.S. 442, 447 (concurring opinion) that "there is difference of opinion as to whether, if we have jurisdiction, we may proceed beyond the construction of the Act and review opinions about the indictment which the lower court expressed but did not rely upon as an independent ground of decision." The more lenient rule seems appropriate in the present circumstances. The district court's dismissal of the indictment was based on its statutory and (alternatively) constitutional interpretations. It expressed no opinion as to the meaning of the indictment which, viewed independently, would have required its dismissal. The court held unequivocally that there was no mere formal defect that could be cured by amending the indictment. Even if "race" were expressly referred to in the first numbered paragraph, the court would still have dismissed the indictment in all respects. And, finally, the court's objection to the omission of a reference to "race" in paragraph one, it seems to us, is without merit in light of the general

[39] Compare *United States* v. *Wayne Pump Co.*, 317 U.S. 200; *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 536, 564; *United States* v. *Carbone*, 327 U.S. 633.

allegation in the opening portion of the indictment—which qualifies all that follows—that the conspiracy was directed at Negroes, to deter Negroes (the same as others, presumably) from exercising their rights (*supra*, p. 5). It would be captious to suggest that the defendants were not sufficiently informed that they were charged with a conspiracy against Negroes *as Negroes*.

The decision below undoubtedly restricts very severely the practical implementation of the rights which Congress sought to bestow in the Civil Rights Act of 1964.[40] The court has held that these rights, "even though recognized by an Act of Congress" (R. 31),[41] are not within the purview of Section 241, even under its most restrictive reading. So long as the validity of the statutory construction given by the district court and challenged by the government here remains in doubt, neither the Executive nor the Congress can properly determine the need for new remedies or the appropriate solution to the problems raised by incidents such as those underlying the present indictment. The prompt authoritative resolution of

[40] It is immaterial to this Court's jurisdiction under Section 3731 that, as to paragraph one, the statute construed was the Civil Rights Act of 1964 rather than Section 241. See *United States* v. *Borden Co.* 308 U.S. 188, 194; *United States* v. *Kapp*, 302 U.S. 214.

[41] This language directly referred to the rights involved in *United States* v. *Bailes*, 120 F. Supp. 614 (S.D. W. Va.), but since the only statute granting substantive rights involved here is the Civil Rights Act of 1964, it may be assumed that the court's reasoning was that the rights sought to be protected here, although embodied in federal legislation, still were not "federal citizenship rights" under Section 241.

disputes over important questions of statutory interpretation, such as are involved here, is a primary goal of 18 U.S.C. 3731. This Court has the authority to resolve the questions concerning the interpretation of the Civil Rights Act of 1964—as well as those concerning Section 241—and we respectfully urge that it do so in this case.

B. We have already noted that the court below dismissed the indictment insofar as it charges a violent conspiracy to interfere with rights granted by Title II of the Civil Rights Act of 1964 on the ground that the exclusive-remedy provision of that law precludes a criminal prosecution. The holding, in effect, is that Congress, while granting the right to equal treatment in places of public accommodation, at the same time immunized from otherwise applicable criminal sanctions persons who conspire to terrorize Negroes to prevent them from even attempting to assert the newly won right. This anomalous result is said to follow from the stipulation in Section 207(b) of the 1964 Act, 42 U.S.C. 2000a–6(b), that "[t]he remedies provided in this subchapter shall be the exclusive means of enforcing the rights based upon this subchapter." But the language of that provision does not compel the expansive interpretation given it by the district court. To the contrary, we submit, the purpose of the statute requires a narrower reading.

It is axiomatic that "the policy as well as the letter of the law is a guide to [its interpretation]. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes

* * *." *Markham* v. *Cabell*, 326 U.S. 404, 409. See also *United States* v. *Bryan*, 339 U.S. 323; *American Tobacco Co.* v. *Werckmeister*, 207 U.S. 284, 293. That this principle applies in the construction of Section 207(b) clearly follows from recent decisions here and in the courts of appeals. In *Hamm* v. *Rock Hill*, 379 U.S. 306, this Court ruled that the provisions of the Act required the abatement of State prosecutions for seeking unsegregated service in places of public accommodation. Even though the injunctive remedy expressly provided in the Act may be used to prevent such prosecutions,[42] *Dilworth* v. *Riner*, 343 F. 2d 226 (C.A. 5), the Court held that this means of enforcing Title II rights was not so "exclusive" as an absolutely literal reading of Section 207(b) might imply. 379 U.S. at 311. None of the dissents in that case were directed at this point. Similarly, in *Rachel* v. *Georgia*, 342 F. 2d 336 (C.A. 5), the court of appeals held that the remedial provisions of the civil rights removal statute, 28 U.S.C. 1443, applied to cases invoking rights granted in the public accommodations law.[43] All members of the panel concurred on this question (342 F. 2d at 344, 345). See, also, *New York* v. *Galamison*, 342 F. 2d 255, 268 (C.A. 2), certiorari denied, 380 U.S. 977. Thus, it is clear that the

[42] Section 203(c) provides that "No person shall * * * punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202" (42 U.S.C. 2000a–2(c)). Section 204(a) provides an injunctive remedy against any person who has done, or is about to do, an act prohibited by Section 203 (42 U.S.C. 2000a–3(a)).

[43] There is a structural similarity in the way the Civil Rights Act of 1964 attaches to both the civil rights removal statute and Section 241. Section 1443(1) permits removal to federal

words of Section 207(b) are not to be read literally to provide that no other means except an injunction is ever available to protect rights granted in Section 201 and 202 of the Act. Careful consideration of the 1964 Act as a whole, we believe, shows that the remedy provided in 18 U.S.C. 241 is available in the present circumstances.

When Congress creates a new civil right, it may be assumed that a conspiracy to oppress any citizen in the free exercise or enjoyment of that right is punishable under Section 241. In fact, it was clearly understood that the creation of the right to equal enjoyment of places of public accommodation would call that statute into play.[4] Congress could, of course, limit

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court of civil or criminal cases "against any person who is denied * * * *a right under any law providing for the equal civil rights of citizens of the United States* * * *." Section 241 provides punishment for "persons [who] conspire to * * * intimidate any citizen in the free exercise or enjoyment of *any right or privilege secured to him by the Constitution or laws of the United States* * * *." (Emphasis added.) In *Rachel*, the court held that the right to equal enjoyment of public accommodations is "a right under any law" under Section 1443 (342 F. 2d at 342–343). Similarly, that same right is a "right * * * secured * * * by the * * * laws" under Section 241.

[4] See the colloquy between the Attorney General and committee counsel in reference to an early version of the public accommodations bill. *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 88th Cong., 1st Sess., pt. II, pp. 1410–1411:

> Mr. FOLEY. At this point, * * * Mr. Attorney General, as to a prosecution by you under section 241 * * *, without enacting a statute today you have action brought under the existing statute for deprivations of rights under the 14th Amendment; is that not correct?
>
> Attorney General KENNEDY. That's right.

the extent to which Section 241 protects against interference with the new right, or it could expressly provide that Section 241 will have no application to the new right at all. But, in the absence of compelling evidence, a purpose to withdraw the sanctions of Section 241 altogether cannot be assumed where, as here, to do so would seriously jeopardize the right that Congress intended to confer.

There can be no doubt that, in passing the Civil Rights Act of 1964, Congress desired to assure all Negro citizens the right to nondiscriminatory treatment in places of public accommodation covered by the Act. So much is undeniable, as Sections 201 and 202, 42 U.S.C. 2000a, 2000a–1, make evident. In pursuing this goal, Congress directed its attention to the proprietors and employees of the establishments mentioned in the Act. Recognizing that voluntary desegregation by white businessmen was not generally to be anticipated in light of the combined pressures of competition and community sentiment,[45] Congress meant to apply only as much leverage as was

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Mr. FOLEY. So therefore what you are doing, you are adding to the existing remedies today the possibility of going in on a remedy predicated upon the Interstate Commerce clause under the provisions of 241 and 242?

Attorney General KENNEDY. Yes.

[45] See Hearings Before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., pt. 1, at 206 (testimony of Assistant Attorney General Marshall); *id.* at 324 (statement of Hon. Frank H. Morris); *id.*, pt. 2, at 690 (testimony of Undersecretary of Commerce Roosevelt); 110 Cong. Rec. (daily ed.) 9460–9462 (statement of Senator Humphrey).

needed to overcome these obstacles. It was felt that the federal injunctive power would provide the necessary countervailing pressure. Aware of the fact that many proprietors were compelled, for reasons of economic survival, to operate segregated facilities, Congress withdrew the criminal and civil liability provisions otherwise applicable where they might be too harsh and would not, in any event, be necessary to accomplish the congressional purpose. Thus, in explaining the first clause of Section 207(b), Senator Humphrey, after paraphrasing the language of that provision, pointed out: "This would mean, for example, that a proprietor who, in the first instance, legitimately but erroneously believes his establishment is not covered by section 201 or section 202 need not fear a jail sentence or a damage action if his judgment as to the coverage of Title II is wrong" (110 Cong. Rec. (daily ed.) 9462).

Read against this background, Section 207(b) may not properly be extended to preclude the present prosecution. To be sure, Congress limited the application of Section 241 where criminal sanctions would not be needed to accomplish actual desegregation of covered establishments. But terrorists, unconnected with any establishment, cannot claim the benefit of the Act's benevolent exemption. None of the reasons for granting the exemption applies to such individuals. Unlike the owner of a particular theater or restaurant who merely fails to accord nondiscriminatory service, they are engaged in threats, intimidation and reprisal—

dangerous and violent conduct.[46] They are acting from malice and are not merely responding to community pressures or fears of economic loss. Their actions, of course, do not stem from honest doubts about the coverage of Title II. And the remedy provided in the Act—"a civil action for preventive relief" (Section 204(a))—is plainly inadequate in cases such as this.

The true reading of Section 207(b), we submit, is that it makes the injunctive remedy "the exclusive means of enforcing the rights based on this title"[47] only *as against the proprietor* of a covered establishment and his agents who are denying service. They are, after all, the only persons who can finally accord the right to nondiscriminatory service, against whom "enforcement" can be compelled. That is not to say that the Act does not concern itself with outsiders. On the contrary, Section 203(b), 42 U.S.C. 2000a–2(b), expressly forbids intimidation, threats or coercion

[46] Section 241, of course, reaches nonviolent as well as violent conspiracies. See, *e.g.*, *United States* v. *Classic*, 313 U.S. 299 (altering and falsely counting ballots). But the inquiry at this point is not the scope of the criminal statute, as such, but the extent to which Section 207(b) limits that scope.

[47] The term "rights" plainly refers to those specified in Sections 201 and 202—the right to nondiscriminatory service at covered places of public accommodation and the right to service free of discrimination imposed by State law—and not the exemption from intimidation by outsiders. That is made clear by the way the term is used throughout the Title, perhaps most clearly in Section 206(a) which refers to the "full exercise of the rights herein described"—a usage wholly inappropriate to immunity from intimidation.

intended to interfere with the right of nondiscriminatory service at places of public accommodation, whether by proprietors or outsiders, and Sections 204(a) and 206(a), 42 U.S.C. 2000a–3(a), 2000a–5(a), authorize injunctive relief against such interference at the instance of an aggrieved person or the Attorney General. But that remedy, often inadequate, is not made exclusive in such cases.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded for trial.

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